

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KARLOS FRYE,

Petitioner,

v.

RAYMOND MADDEN,

Respondent.

Case No. 2:21-cv-01682-JDP (HC)

FINDINGS AND RECOMMENDATIONS
THAT THE AMENDED PETITION BE
DISMISSED WITHOUT LEAVE TO AMEND
AS TIME-BARRED

ECF No. 6

Petitioner, proceeding without counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. After reviewing his initial petition, I found that it was time-barred and could not proceed. ECF No. 5. I gave petitioner an opportunity to amend and to explain why, despite untimeliness, his claims should be allowed to proceed. *Id.* Petitioner filed an amended petition which, for the reasons stated below, does not save his claims.

The amended petition is before me for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, the assigned judge must examine the habeas petition and order a response unless it “plainly appears” that the petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

Petitioner was convicted of attempted murder in 2000. He now argues that his conviction should be overturned based on four affidavits that indicate that he was not the shooter.¹ ECF No.

¹ A more detailed recitation of the facts can be found in my previous order, ECF No. 5.

1 6 at 44-53. He acknowledges that his petition is untimely but argues that he should be allowed to
2 proceed because he has presented evidence of his actual innocence.

3 The actual innocence standard permits a time-barred petition to proceed where the
4 petitioner “presents evidence of innocence so strong that a court cannot have confidence in the
5 outcome of the trial unless the court is also satisfied that the trial was free of non-harmless
6 constitutional error” *Schlup v. Delo*, 513 U.S. 298, 316 (1995). As explained in my
7 previous order, the affidavits presented by petitioner fall short of presenting strong evidence of
8 his innocence. Two of the affiants, Milo Melson and Roosevelt Beatty, state that their testimony
9 *at trial* already cast doubt on petitioner’s culpability. ECF No. 6 at 45, 52-53. Thus, their current
10 affidavits are hardly new evidence of innocence. More broadly, none of the affidavits are
11 sufficient to show that “no juror, acting reasonably, would have voted to find him guilty beyond a
12 reasonable doubt.” *Schlup*, 513 U.S. at 329. And the credibility of affidavits, like these, executed
13 years after trial is suspect. *See Herrera v. Collins*, 506 U.S. 390, 417-18 (1993).

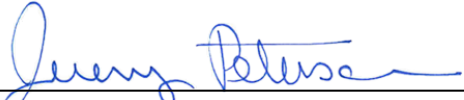
14 Accordingly, it is ORDERED that the Clerk of Court shall assign a district judge to rule
15 on these findings and recommendations.

16 Further, it is RECOMMENDED that the amended petition, ECF No. 6, be DISMISSED
17 without leave to amend as untimely.

18 These findings and recommendations are submitted to the U.S. District Court Judge
19 presiding over this case under 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of
20 Practice for the United States District Court, Eastern District of California. Within fourteen days
21 of service of the findings and recommendations, petitioner may file written objections to the
22 findings and recommendations with the court and serve a copy on all parties. That document
23 must be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The
24 District Judge will then review the findings and recommendations under 28 U.S.C.
25 § 636(b)(1)(C).
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2 IT IS SO ORDERED.

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4 Dated: March 11, 2022


JEREMY D. PETERSON
UNITED STATES MAGISTRATE JUDGE